(2)

No. 89-1865

In the
Supreme Court of the United States

OCTOBER TERM, 1989

GUADALUPE COUNTY,
PETITIONER,

v.

LORELEI CORPORATION,
RESPONDENT.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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**Admitted to practice before the United States Supreme Court on or about February 19, 1985*

June, 1990

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED BY RESPONDENT

1. How could Petitioner have been deprived of the subject ten acres of land in Sequin, Guadalupe County, Texas when Petitioner did not own and never owned such ten acres?

2. Where Petitioner was not a party to the district court action from the inception up and through the judgment entered in the district court, does Petitioner now have a right to trial on the merits?

3. Does the district court have authority to require a supersedeas bond under Rule 62 of an appellant (now Respondent) who was <u>not</u> a party to the action in the district court from inception up and through judgment entered in that action?

4. Does the district court have authority to require a supersedeas bond under Rule 62 of an appellant (now Respondent) who has validly acquired the property, and was not a party to the judgment entered in the district court, and owes nothing to and is in no way indebted to the plaintiffs in the district court action; nor were there any allegations of indebtedness of Respondent to Plaintiff in the district court proceeding?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

No. 89-1865

GUADALUPE COUNTY,

Petitioner,

v.

LORELEI CORPORATION,[1]

Respondent

BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

The United States of America Small Business Administration (the "SBA") filed

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1/ The stock of Lorelei Corporation, a Maine corporation, is 95% owned by Ayyabba Resources, Ltd., an Arkansas corporation.

the instant action against Vahlco Corporation ("Vahlco"), Magnum Machine & Tool Corporation ("Magnum"), and Frederick H. Vahlsing, Jr. ("Vahlsing") in April, 1976.

On June 7, 1982, the district court entered a judgment in favor of the Plaintiff SBA against Vahlco, Magnum and Vahlsing. On June 11, 1982, the district court vacated the judgment of June 7, 1982 and entered an Amended Judgment to that Judgment of June 7, 1982 in favor of Plaintiff SBA against Vahlco, Magnum and Vahlsing. The Amended Judgment ordered the second real estate lien to be foreclosed by the U.S. Marshal against ten (10) acres of land located in Seguin, Texas ("the Property"), and the proceeds of the sale of the Property used for payment of expenses of sale, payment of a superior lien, costs of suit by Plaintiff, and "then payment and satisfaction of this

judgment."

Thereafter, by Order dated July 19, 1982, the district court stayed the sale of the Property and ordered Vahlco, Magnum and Vahlsing not to dispose of, incumber or compromise the lien position of the United States. In that Order, the district court also ordered Margarita Oil Company, Ltd. ("Margarita") and Lorelei Corporation ("Lorelei"), entities that were not parties to the case, not to dispose of, incumber or compromise the lien position of the United States.

On November 18, 1983, Margarita and Lorelei filed a Motion for Hearing in the district court requesting that the July 19, 1982 Order be dissolved and be set aside as to Margarita and Lorelei. The district court made no response to that motion of Margarita and Lorelei of November 18, 1983 other than on February 2, 1984, the district court heard argument

of counsel and took the Order sought to be dissolved and set aside by Margarita and Lorelei under advisement. At that hearing, no testimony from any party was heard by the district court.

On October 9, 1984, the district court again ordered the Property to be sold. On October 26, 1984, Lorelei appealed the Order (of sale) of October 9, 1984 to the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") and sought a stay of the sale pending the appeal to the Fifth Circuit, which stay was granted by the district court.

A sale was conducted on April 23, 1985 by the Marshal, pursuant to the Order of October 9, 1984 and a Marshal's Deed was issued on May 23, 1985 pursuant to that sale. (Appendix at p. 1a)

By Opinion issued October 16, 1985, the Fifth Circuit reversed the district court's Order of October 9, 1984 directing

the sale of the Property then owned by Lorelei. The Fifth Circuit remanded the case with directions to the district court to deliver the proceeds to Lorelei unless cause was shown for further proceedings and/or a different disposition of the proceeds.

On remand, Guadalupe County ("Guadalupe") intervened and requested summary judgment as to its interests and a reformation of the Marshal's Deed of May 23, 1985. On October 6, 1987, the district court granted summary judgment for Guadalupe County and ordered a reformation of the deed to Guadalupe County. On April 21, 1989, the district court denied a motion for reconsideration and affirmed the summary judgment of October 6, 1987, validated a reformation of the deed, and placed title in Guadalupe County, all by final judgment of the district court.

Lorelei appealed to the United States

Court of Appeals for the Fifth Circuit the district court's final judgment order granting summary judgment, ordering reformation of the deed to Guadalupe County, and placing title in Guadalupe County.

The case before the United States Court of Appeals presented the appeal of a landowner (Lorelei) which was deprived of its property to satisfy a judgment to which it was not a party. The land at issue is ten acres and improvements thereon in Seguin, Guadalupe County, Texas (the "Property"). This case has a complex procedural history in the district court of the Western District of Texas, San Antonio Division. Detailed herein are the facts and proceedings directly relevant to this appeal, to wit:

On December 10, 1973, Vahlco executed a promissory note (the "Note") to First

National Bank of Seguin, Texas ("First National") at a time when there was a previous Note dated August 1, 1973 of Vahlco outstanding to First National along with a second Deed of Trust dated August 1, 1973, secured by the Property and which Deed of Trust, dated August 1, 1973, contained an after-acquired clause. The Note of August 1, 1973, which contained an after-acquired clause, was a second lien note on the Property, subordinate and inferior to a first lien note dated February 7, 1972, held by the Seguin Savings Association ("Seguin Savings") in the original principal amount of $100,000. The note of February 7, 1972 was secured by a First Deed of Trust on the Property in the amount of $100,000. The Deed of Trust in the amount of $100,000 was acknowledged by the district court as being first and superior to other Deeds of Trust and liens on the Property. Accor-

dingly, the Note of December 10, 1973 and the Note of August 1, 1973 were secured by a second lien on the Property.

Vahlsing was an alleged guarantor of that second lien Note of December 10, 1973. However, on September 19, 1986, the United States Court of Appeals for the Fifth Circuit vacated the judgment against Vahlsing as guarantor of that second lien Note of December 10, 1973 in Case No. 85-2629 and remanded the matter for further hearing to the lower court. To this day, there has been no trial or hearing in the district court or in any other federal court or in any state court whereby Vahlsing has been adjudicated guarantor of that second lien Note of December 10, 1973 after the decision of the United States Court of Appeals for the Fifth Circuit on September 19, 1986 in Case No. 85-2629 whereby the judgment in the district court against Vahlsing as

guarantor of the second lien Note was vacated by the United States Court of Appeals for the Fifth Circuit.

The first lien on the Property was held by Seguin Savings by virtue of a $100,000 loan to Vahlco by Seguin Savings, secured by a first Deed of Trust on the Property made on February 7, 1972.

In 1974, Magnum received title to the Property from Vahlco subject to the first lien held by Seguin Savings and subject to the second lien held by First National. In February, 1976, First National assigned the second lien to the SBA. Thereafter, on August 20, 1976, Margarita purchased the first lien for cash (certified check) from Seguin Savings.

Margarita foreclosed on the first lien on June 1, 1982 and was high bidder at the foreclosure sale and acquired the Property. Thereafter, the Property was purchased by Lorelei from Margarita on

June 4, 1982 and the deed evidencing the purchase was filed for recordation on June 7, 1982 in the deed records of Guadalupe County, Texas.

In April, 1976, the SBA instituted its action on the Note which it had received by assignment in February, 1976 from First National, against Vahlco, Magnum and Vahlsing. On June 7, 1982, the district court entered judgment in favor of the SBA against Vahlco, Magnum and Vahlsing. The district court vacated the judgment of June 7, 1982 and issued an Amended Judgment in favor or the SBA against Vahlco, Magnum and Vahlsing on June 11, 1982. The Amended Judgment of June 11, 1982 ordered (1) that the SBA's second real estate lien be foreclosed against the Property; (2) that an Order of Sale be issued commanding the United States Marshal to seize and sell the Property at public auction; and (3) that the proceeds

from the sale be applied first to expenses of sale, thence to the outstanding first real estate lien held by Margarita, thence to plaintiff's cost of suit, and thence in payment and satisfaction of the judgment.

At the time that the Amended Judgment was entered on June 11, 1982, neither Margarita nor Lorelei was a party in the case. Furthermore, no relief had been sought by the SBA against Margarita or Lorelei. Lorelei was not even mentioned in the vacated judgment of June 7, 1982 or in the Amended Judgment of June 11, 1982 or in the Order of Sale of June 11, 1982 and the only mention of Margarita in the Amended Judgment of June 11, 1982 and the Order of Sale of June 11, 1982 was that Margarita held the first lien on the Property.

On July 19, 1982, the district court stayed the Order of Sale and ordered Margarita and Lorelei:

> not to dispose of, incumber or otherwise compromise the lien position of the United States of America as evidenced by the June 11, 1982 judgment until such time as the Court holds a hearing to decide the rights and priorities of the parties with respect to their respective interests in said property. (Emphasis added.)

Since the July 19, 1982 order prohibited action by Margarita or Lorelei, Margarita and Lorelei, on November 18, 1983, filed a Motion for Hearing, challenging the district court's jurisdiction to order relief against entities that were not parties to the action at the time the judgment was entered or at the time the relief was ordered.

On October 9, 1984, the district court again ordered the sale of the Property. The district court ordered the distribution of the proceeds as follows: first paying expenses of sale, thence satisfying the first real estate lien, thence costs of suit against the defendants, and thence (a) if there were a deficit remaining on

the judgment after sale, to execute further on other proeprty of Vahlco and (b) if there were an excess of the proceeds after the sale over the judgment, to deliver the excess to Magnum.

On October 26, 1984, Margarita and Lorelei appealed the district court's Order of October 9, 1984 to the United States Court of Appeals for the Fifth Circuit, and requested a stay pending appeal. On November 9, 1984, the district court granted the stay pending appeal.

On February 25, 1985, more than three months after the stay was granted and the appeal to the United States Court of Appeals for the Fifth Circuit by Margarita and Lorelei in progress, the district court ordered Margarita and Lorelei to post a supersedeas bond. No bond was posted. The U.S. Marshal sold the interest of Vahlco in the Property on April 23, 1985 to Guadlaupe. The Marshal's Deed

recited that the U.S. Marshal:

> granted, bargained, and sold, and by these presents do grant, bargain, and sell unto the said Guadalupe County, State of Texas all the right, title, interest and claim which the said Vahlco Corporation, Defendant, on the day of sale aforesaid had in and to the ... tract of land, ... (emphasis added) (Appendix p. 1a)

The Marshal's Deed was issued on May 23, 1985 pursuant to the sale conducted on April 23, 1985. The former president of Magnum attended the sale and signed an affidavit which clearly sets forth that the United States was not guaranteeing title at the sale and that the buyers were buying whatever interest the United States had.

On October 16, 1985, in Case No. 84-2617, the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") determined that the lien interest of the United States of America SBA was extinguished at the foreclosure sale by Margarita, the first lien holder,

on June 1, 1982. In that determination, the Fifth Circuit also found that after the foreclosure of the first lien holder on June 1, 1982, the SBA had no rights or priorities with respect to the Property. Additionally, the Fifth Circuit reversed the district court's order of sale of October 9, 1984 and remanded the case to the district court.

Once the case was remanded, Guadalupe moved to intervene in the case, and filed a motion for summary judgment and for a reformation of the deed. On October 6, 1987, the district court granted summary judgment for Guadalupe and ordered the Marshal's Deed of May 23, 1985 reformed in that "(w)hether right or wrong, the Court ordered the property sold."

Pursuant to the district court's order of October 6, 1987, the U.S. Marshal issued a new deed (back dated by Marshal Jonas to May 23, 1985, with the signature

of Marshal Jonas being attested thereon by Charles W. Vagner, Clerk of the United States District Court, as having been affixed to that Deed on December 17, 1987) with different attestations selling and conveying the Property to Guadalupe. The reformed deed recites:

> Witnesseth, That whereas, at a regular Term of the District Court of the United States, held in and for said District, on the 11th day of June, in the years A.D. 1982, United States of America, Plaintiff, recovered a judgment against Frederick H. Vahlsing, Jr., Vahlco Corp., Magnum Machine & Tool Corp. and Margarita Oil Co. Ltd. and Lorelei Corp, Defendant, in a certain plea for the forfeiture and sale of 10 acres in Guadalupe County, State of Texas and all costs of suit ... (emphasis added)

The reformed deed clearly erroneously states that a judgment has been rendered or entered against Margarita and Lorelei in this matter on June 11, 1982. No such judgment had ever been rendered or entered. Furthermore, the judgment against Vahlsing had already been vacated by the

Fifth Circuit on September 19, 1986 in Case No. 85-2629.

Lorelei appealed the district court's October 6, 1987 Order to the Fifth Circuit on November 2, 1987. That appeal was dismissed by the Fifth Circuit March 1, 1988 on the motion by the SBA in that no final judgment had been entered by the district court.

On October 28, 1987, Lorelei filed a motion for reconsideration of the district court's Order of October 6, 1987. On April 21, 1989, the district court denied the motion for reconsideration and granted final judgment reformation of the Marshal's Deed of May 23, 1985 and granted final judgment of giving title to Guadalupe so that the appeal in this complex matter could be submitted to the Fifth Circuit. Lorelei (now Respondent herein) appealed that final judgment order of the district court of April 21, 1989

granting a reformation of the Marshal's Deed of May 23, 1985 and giving title to Guadalupe.

On March 9, 1990, the Fifth Circuit issued its decision in Case No. 89-5556, reaffirming that Margarita had acquired the Property on June 1, 1982 in connection with its foreclosure sale on its first lien on the Property on that date; and further, that the second lien interest of the SBA (United States of America) had been extinguished in connection with the foreclosure of the first Deed of Trust; and further, after Margarita had acquired the Property at the foreclosure, Margarita conveyed the Property to Lorelei; accordingly, title to the Property is vested in Lorelei.

SUBSTANTIAL ERRORS OF FACT COMMITTED BY PETITIONER IN ITS SUBMISSION

A. Petitioner, Guadalupe County, committed substantial errors in its statement of facts in connection with its "Statement of the Case" relative to its Petition for Writ of Certiorari (hereinafter "Petition of Guadalupe"), to wit:

(Set forth below is the first paragraph of the "Statement of the Case" of Guadalupe County)

> " This controversy arises out of the purchase by Guadalupe County, at a United States Marshal's sale, of 10 acres of land to be used for the building of the new Gudalupe County jail. At a sale held April 23, 1985, Guadalupe County was the high bidder and was awarded the property. The purchase price of $125,000 was paid and on May 23, 1985, the land was conveyed to Guadalupe County by the United States Marshal. The property was sold pursuant to an order entered October 9, 1984 by the Honorable William S. Sessions, Chief Judge, in

Cause No. SA-76-CA-106, U.S. v. Vahlco Corp., et al., in the San Antonio Division of the Western District of Texas. (Appendix p. 26a)."

(Petition of Guadalupe, pgs. 2-3).

The United States Marshal's sale on April 23, 1985 sold all right, title, and interest of Vahlco Corporation in and to the subject 10 acres of land. (See Record, Deed issued by United States Marshal Jonas, dated May 23, 1985; Appendix p. 1a).

At the Marshal's sale, held April 23, 1985, Guadalupe was the high bidder and was awarded all right, title, and interest of Vahlco in and to the property as set forth in the Deed. The purchase price of $125,000 was paid and thus all right, title and interest of Vahlco in and to the property was conveyed to Guadalupe. At the time of the Marshal's sale, although judgment was against Vahlco, Vahlco clearly had no interest whatsoever in the

property. Lorelei was the record title holder of the subject 10 acres. Lorelei was not party to the proceeding in the United States District Court for the Western District of Texas in Cause No. SA-76-CA-106 at the time of the issuance of the judgment on June 7, 1982 or at the time of the issuance of the amended (correcting the judgment of June 7, 1982) judgment of June 11, 1982. Accordingly, there was no judgment against Lorelei under which the Marshal sold anything of Lorelei in connection with the sale on April 23, 1985.

All of the right, title and interest of Vahlco in and to the property was sold pursuant to an order entered October 9, 1984 by the Honorable William S. Sessions, Chief Judge, in Cause No. SA-76-CA-106, U.S. v. Vahlco Corp., et al., in the San Antonio Division of the District Court of the Western District of Texas. The order

of October 9, 1984 was reversed by the Fifth Circuit in its decision dated October 16, 1985 in Cause No. 84-2617.

B. The Petition of Guadalupe, on p. 3, references paragraphs 7 & 8 below as part of an opinion of the Fifth Circuit in U.S. v. Vahlco Corp., et al., Cause No. 84-2617 on October 16, 1985:

> "7. Margarita and Lorelei were required to post a supersedeas bond pursuant to Fed. R. Civ. P. 62 by the district court in February, 1985. They failed to do so and did not seek a stay of the order of sale. By this time they were clearly parties to the case and when the property was sold by the Marshall (sic) in April of 1985, Lorelei was divested of the title to the property; and the title was then vested in the purchaser, who is said to be Guadalupe County. The proceeds of that sale are in the hands of the court.
>
> 8. We remand the case with directions to the district court to deliver the proceeds to Lorelei Corporation unless cause be shown to that court for further proceedings and/or a different disposition of the proceeds."

(Petition of Guadalupe, p.3)

However, in a subsequent decision of the Fifth Circuit in U.S. v. Vahlco Corp., et al., Cause No. 89-5556, on March 9, 1990, the Fifth Circuit addressed paragraph 7 as being clearly in error and pursuant to Williams v. City of New Orleans, 763 F.2d 667, 669 (5th Cir.1985) and White v. Murtha, 377 F.2d 428, 431, eliminated paragraphs 7 and 8 of its prior decision on October 16, 1985 in U.S. v. Vahlco Corp., et al., Cause No. 84-2617 stating that paragraph 7 was clearly in error and it would be manifestly unjust for a court to order a property owner not a party to a lawsuit to post a supersedeas bond in the amount of the judgment in the suit to avoid execution upon the property.

C. Misstatement of fact on page 5 of Petition of Guadalupe County, set forth below:

"The notes were 90% guaranteed by the SBA, and, after default, were assigned to the SBA. The notes were secured by a second lien on the 10-acre tract of land ultimately sold to Guadalupe County."

As the record in the district court below discloses, only the $350,000 note was guaranteed by the SBA. The $10,000 note, for money borrowed by Vahlco from the First National Bank of Seguin, was to make payroll of Vahlco. The SBA did not guarantee such $10,000 note or provide any funds in connection with such $10,000 note.

D. Additional misstatement of fact on page 5 of Petition of Guadalupe County, set forth below:

" After the suit had been filed, Vahlsing had a company he controlled, Margarita Oil Company, Ltd., buy the first lien indebtedness from Seguin Savings Association."

(Petition of Guadalupe, p. 5)

As the record in the district court

below plainly shows, there is no fact, circumstance, or finding that Margarita Oil Company, Ltd. was contolled by Vahlsing (F. H. Vahlsing, Jr.) during the year, 1976 (the year of purchase of the first lien indebtedness from Seguin Savings Association) or at any time thereafter, up until the present. Accordingly, such statement in the Petition of Guadalupe is just false, with no basis, and a product of product of litigation pleading based upon wishful thinking, certainly not fact.

E. Further misstatement of fact on page 6 of Petition of Guadalupe, set forth below:

> " Vahlsing had Margarita Oil Company, Ltd. sell the property to satisfy the first lien indebtedness."

(Petition of Guadalupe, p. 6)

As the record in the district court below plainly shows, there is no fact, circumstance, or finding that Vahlsing had

Margarita Oil Company, Ltd. sell the property to satisfy the first lien indebtedness. The record is absolutely void, as of the time of the sale, 1982, that Vahlsing was an officer, director, employee, or agent of Margarita Oil Company, Ltd. Nor was Vahlsing a shareholder of Margarita Oil Company, Ltd., either directly or indirectly, in 1982, or at any time thereafter. Accordingly, such statement in the Petition of Guadalupe is patently false, with no basis, and a product of litigation pleading based upon wishful thinking, certainly not fact.

F. Additional misstatement of fact on page 6 of Petition of Guadalupe, set forth below:

> "Vahlsing then had Margarita convey the property to another company controlled by him, Lorelei Corporation, on June 4, 1982."

(Petition of Guadalupe, p. 6)

The record in the district court below is absolutely void of any evidence to show that Vahlsing (F. H. Vahlsing, Jr.) had Margarita convey the property to anyone, let alone Lorelei Corporation. Accordingly, such statement in the Petition of Guadalupe is patently false, with no basis, and a product of litigation pleading based upon wishful thinking, certainly not fact.

The record in the district court below is absolutely void of any evidence to show that Vahlsing controlled Lorelei Corporation in June of 1982 or at any time thereafter. Accordingly, such statement in the Petition of Guadalupe is patently false, with no basis, and a product of litigation pleading based upon wishful thinking, certainly not fact.

G. Further additional misstatement on page

6 of Petition of Guadalupe, set forth below:

> "When the government learned of this activity by Vahlsing, Margarita and Lorelei"

(Petition of Guadalupe, p. 6)

The record in the district court below is absolutely void of any testimony or evidence to show any activity of any nature whatsoever by Vahlsing in connection with Margarita and Lorelei in 1982. Accordingly, such statement in the Petition of Guadalupe is patently false, with no basis, and a product of litigation pleading based upon wishful thinking, certainly not fact.

H. Further additional misstatement on page 7 of Petition of Guadalupe, set forth below:

> " The government contended at the hearing on February 2, 1984, that the conveyances from Vahlco to Magnum to Margarita to Lorelei were made for the purpose of thwarting the judgment of the U.S. District Court."

(Petition of Guadalupe, p. 7)

The record in the district court below is absolutely void of any evidence to show a conveyance from Magnum to Margarita. Margarita purchased the first lien indebtedness from Seguin Savings Association in 1976 and held such first lien indebtedness for approximately six years. On June 1, 1982, Margarita foreclosed on the property pursuant to its first lien indebtedness purchased from the Seguin Savings Association. After Margarita acquired the property pursuant to a foreclosure sale, (found appropriate and proper by the Fifth Circuit) Margarita sold such property to Lorelei for consideration. Accordingly, such statement in the Petition of Guadalupe is patently false, with no basis, and a product of litigation pleading based upon wishful thinking, certainly not fact.

I. Further additional misstatement on page 8 of the Petition of Guadalupe, set forth below:

> "The stay being lifted, the U.S. Marshal proceeded to implement the court's order of October 9, 1984, by advertising the property for sale and subsequently selling it to the highest bidder, which was Guadalupe County."

(Petition of Guadalupe, p. 8)

The record in the district court below shows that the U.S. Marshal did not sell the property to Guadalupe. The record in the district court below shows that the U.S. Marshal sold all right, title and interest of Vahlco Corporation in and to the property to Guadalupe. Accordingly, such statement in the Petition of Guadalupe is patently false, with no basis, and a product of litigation pleading based upon wishful thinking, certainly not fact.

J. Theory on page 13 of the Petition of Guadalupe, which is set forth below, is in substantial error:

> "The reason for the denial of right to a trial on the merits is the title finding made by the court at a time when Guadalupe County was not yet a party."

(Petition of Guadalupe, p. 13)

The foregoing theory of Guadalupe is in substantial error and misleading. The record below plainly shows that when Margarita foreclosed on its first lien, which lien had been acquired by Margarita almost six years (in the Summer of 1976) prior to the foreclosure date (Spring of 1982), the second lien was extinguished. Accordingly, Lorelei Corporation owned the property after purchase from Margarita for consideration. Since the second lien had been extinguished long before Guadalupe even considered purchasing all the right, title, and interest of Vahlco Corporation in and to the property at the Marshal's

sale, Guadalupe was in no way denied any due process nor was Guadalupe in any way entitled to become part of the litigation as to an event which had occurred three years prior to Guadalupe making any type of an appearance in connection with the purchase of the property or anything else in connection with U.S. v. Vahlco Corp., et al., SA-76-CA-106 in the San Antonio Division of the District Court of the Western District of Texas.

By the same theory, Guadalupe could plead that it should have been offered by the Seguin Savings Association the opportunity to purchase the first lien in the Summer of 1976 (when such lien was validly purchased by Margarita), almost ten years prior to Guadalupe's appearance at the Marshal's sale on April 23, 1985.

SUMMARY OF ARGUMENT FOR NOT GRANTING THE WRIT

The matters relative to Cause No. SA-76-CA-106, U.S. v. Vahlco Corp., et al., in the San Antonio Division of the District Court for the Western District of Texas have been before the United States Court of Appeals for the Fifth Circuit on at least five (5) occasions, to wit:

U.S. v. Vahlco Corp., 720 F.2d 885 (5th Cir. 1983)

U.S. v. Vahlco Corp., Cause No. 84-2617 (Unpublished Opinion dated October 16, 1985)

U.S. v. Vahlco Corp., 800 F.2d 462 (5th Cir. 1986)

U.S. v. Vahlco Corp. Cause No. 87-5600 (dismissed on the ground that there was no final judgment)

U.S. v. Vahlco Corp., 895 F.2d 1070 (5th Cir. 1990)

Accordingly, Respondent, Lorelei Corporation, references the decisions of the Fifth Circuit, as amended by the Fifth

Circuit.

Additionally, the Petition for Writ of Certiorari submitted by the Petitioner, Guadalupe County, contains at least eight major and patently false facts and/or averments submitted in such a manner so as to attempt to mislead and deceive this Honorable Court. (See SUBSTANTIAL ERRORS COMMITTED BY APPELLANT herein.)

Also, the Petition of Guadalupe County was submitted for delay in order that the mandate of the Fifth Circuit be delayed until after the election of local officials of Guadalupe County in that Guadalupe County undertook improvements on the Property without a title policy and without waiting until the litigation concerning the property had been finally decided.

ARGUMENT

The Petition for Writ of Certiorari of

Petitioner, Guadalupe County, was not filed upon a good faith belief that a question of federal law is present in which the adjudication of this Honorable Court is necessary. The Petition for Writ of Certiorari was filed with the primary motive to delay the issuance of the Mandate by the Fifth Circuit in that certain officials of Guadalupe County are running for re-election and such officials do not wish to be confronted with the mandate of the Fifth Circuit until after the election is held.

The Fifth Circuit has had various aspects of the record of Cause No. SA-76-CA-106, U.S. v. Vahlco Corp., in the San Antonio Division of the District Court for the Western District of Texas before it on at least five occasions. (One appeal was dismissed in that the appeal did not pertain to a final order and accordingly, that appeal was dismissed "until such time

as a final order was issued.")

The Fifth Circuit has ruled each time on the matters relative to Cause No. SA-76-CA-106, U.S. v. Vahlco Corp, in the San Antonio Division of the United States District Court for the Western District of Texas, including a correction to its decision in Cause No. 84-2617 decided October 16, 1985 (unpublished).

In their section "REASONS FOR GRANTING THE WRIT I. DUE PROCESS," Petitioner, Guadalupe asserts that "when Guadalupe County intervened, the law of the case included a finding that 'when the property was sold by the Marshall (sic) in April of 1985, Lorelei was divested of title to the property; and the title was then vested in the petitioner, who is said to be Guadalupe County.'" (emphasis added) (Petition at p. 13) (quoting from paragraph 7 of the opinion of October 16,

1985 of the United States Court of Appeals for the Fifth Circuit in Cause No. 84-2617).

HOWEVER, the Fifth Circuit, addressed the "law of the case doctrine" in U.S. v. Vahlco Corp., 895 F.2d 1070 (5th Cir. 1990), to wit:

> It is ... established that a prior decision does not establish the law of the case if "the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." Williams v. City of New Orleans, 763 F.2d 667, 669 (5th Cir.1985) (quoting White v. Murtha, 377 F.2d 428, 431 (5th Cir.1967). (Emphasis added.)

U.S. v. Vahlco Corp., 895 F.2d 1070 (5th Cir. 1990) at 2597.

The Fifth Circuit further addressed the argument of Guadalupe County, to wit:

> Guadalupe County suggests that paragraph seven trumps the rest of the decision and establishes the law of the case in the County's favor. Paragraph seven, however, is not

> binding as the law of the case because its finding that Lorelei was a party to the suit is clearly in error. Neither Lorelei nor Margarita was named as a defendant in the SBA's suit. Neither Lorelei nor Margarita participated in the trial before the judgment was rendered. The record discloses no service of process on Margarita or Lorelei at any time while the case was in the district court. Furthermore, the district court's docket sheets indicate unequivocally that contrary to the finding in paragraph seven Lorelei was not a party to the SBA suit in February 1985 when Lorelei was ordered to post the supersedeas bond. Lorelei had neither intervened nor been made a party in the district court.

Id. at p. 2598.

From the foregoing, it is obvious that Petitioner, Guadalupe County has misrepresented the "law of the case doctrine" in an attempt to mislead this Honorable Court and to have this Honorable Court grant the Writ of Certiorari to accomplish its self-serving ends to further delay the issuance of the mandate in the Fifth Circuit.

In their section "REASONS FOR GRANTING THE WRIT I. DUE PROCESS," Guadalupe County further asserts: "Guadalupe County has been denied the opportunity to prove at a trial on the merits that the first lien was extinguished by the purchase by the mortgagor of the note he signed. ... The reason for the denial of the right to a trial on the merits is the title finding made by the court at a time when Guadalupe County was not yet a party." (Petition at p. 12)

The record below evidences that Guadalupe was but a bidder at a Marshal's sale held on April 23, 1985 which was void in that "the district court had no authority to order the sale of Lorelei's property in the suit brought by the SBA." U.S. v. Vahlco Corp., 895 F.2d 1070 (5th Cir. 1990) at 2597.

Guadalupe County's assertion "(f)or the Fifth Circuit now to hold that it (the opinion of October 16, 1985 in Cause No. 84-2617) was a final adjuciation of title that forever bars Guadalupe County is a denial of due process," (Petition at p. 14) is an attempt by Guadalupe to obfusacte the issues.

In reality, Guadalupe has no due process rights to be addressed. Guadalupe never held title to the subject property. Guadalupe's only claim to the subject property was pursuant to a clearly erroneous part of the decision of the Fifth Circuit "which was not binding as the law of the case" Id. at 2598. Accordingly, Guadalupe has no standing to adopt or assert any proposition of law relative to the subject property.

In their section "REASONS FOR GRANTING

THE WRIT II. SUPERSEDEAS BOND," Guadalupe's argument that the docket sheets in the district court show that "Lorelei did appear in the cause" (Petition at p. 13) fails to reflect the technical meaning of the legal term "appear," as defined by Black's Law Dictionary, to wit: "(c)oming into court by a party to a suit, whether plaintiff or defendant." (Emphasis added.) See Black's Law Dictionary, 89 (Fifth Edition 1979).

The Fifth Circuit addressed the technical meaning of the legal term "party," as pertained to Lorelei in the district court, to wit:

> Neither Lorelei nor Margarita was named as a defendant in the SBA's suit. Neither Lorelei nor Margarita participated in the trial before the judgment was rendered. The record discloses no service of process on Margarita or Lorelei at any time while the case was in the district court. Furthermore, the district court's docket sheets indicate unequivocally that ... Lorelei was

> not a party to the SBA suit in February 1985 when Lorelei was ordered to post a supersedeas bond. Lorelei had neither intervened nor been made a party in the district court. (Emphasis added.)

Id. at 2598.

Guadalupe County's further argument that "Lorelei ... sought relief from the court, argued its position and appealed from an unfavorable result" (Petition at p. 17) does little to advance Guadalupe County's argument that such might infer that Lorelei was a "party" in that "as a non-party affected by the judgment, Lorelei was entitled to appeal in order to protect its interests. See United States v. Chagra, 701 F.2d 354, 359 (5th Cir. 1983) (citing with approval e.g. SEC v. Lincoln Thrift Ass'n, 577 F.2d 600, 602-03 (9th Cir.1978) and West v. Radio-Keith-Orpheum Corp., 70 F.2d 621, 623-24 (2nd Cir.1934), allowing appeals by

non-party creditors who assert rights in receivership proceedings; as well as Brown v. Board of Bar Examiners, 623 F.2d 605, 608 (9th Cir.1980) and Commercial Sec. Bank v. Walker Bank & Trust Co., 456 F.2d 1352 (10th Cir.1972), allowing appeals by non-parties who are named in injunctions)." (Emphasis added.) U.S. v. Vahlco Corp., 895 F.2d 1070 (5th Cir. 1990).

Guadalupe County's further argument that while "(t)he court's statement that 'it would be manifestly unjust for a court to order a property owner not a party to a lawsuit to post a supersedeas bond in the amount of the judgment in the suit to avoid execution upon the property' ... might well be true as an abstract proposition ... it does not apply to this case" is misplaced. The record below

evidences, and the Fifth Circuit found that "there had been no effort to justify such contention by pleading or proof in the district court" (relative to the claim of fraud by the United States). Cause No. 84-2617. It must be noted here that such findings have never been challenged by anyone in any subsequent submissions to the Fifth Circuit as evidenced by the fact that the Fifth Circuit reasserted that very finding in its DENIAL of the Petition for Rehearing by the United States on April 11, 1990, (Petitioner's Appendix p. 8a - 9a) in explaining that "(t)hat holding (in Cause No. 84-2617) went on to recognize that it did not in any way adjudicate whatever claims the United States had against Vahlco, Magnum Machine and Tool, and Lorelei." (Petitioner's Appendix p. 8a).

In light of the foregoing, for Guadalupe to now attempt to pursuade this Honorable

Court that "Judge Sessions was familiar with the facts of the case" (Petition at p. 19) is not only a failure by Guadalupe to reflect the true meaning of the technical legal term "fact" in that "(f)act means reality of events or things the actual occurrence or existence of which is to be determined by evidence," (see, Black's Law Dictionary, 532 (Fifth Edition 1979), but also an attempt by Guadalupe to obfuscate the issues and attempt to lend credibility to Guadalupe's argument.

Further, Guadalupe's reasoning on page 18 of the Petition concerning Rule 62(d) is not only self-serving, but also misguided in light of the opinion of Poplar Grove Planting and Refining Co., Inc. v. Bache Halsey Stuart, Inc., 600 F.2d 1189 (5th Cir. 1979) in which it is specifically set forth that "the purpose of a supersedeas bond is to preserve the

status quo while protecting the non-appealing party's rights pending appeal. A judgment debtor who wishes to appeal may use the bond to avoid the risk of satisfying the judgment ... a supersedeas bond is a privilege extended to the judgment debtor at a price of interdicting the validity of an order to pay money. Id. at 1190-1191. It must be noted here that it was that very case, Poplar Grove which was addressed by Guadalupe County (Petition at p. 11) in connection with Guadlaupe County's assertion that "Judge Sessions pointed out in his order that it was the burden of the appealing party to demonstrate that a supersedeas bond is not required ..." (Petition at p. 11) The record below evidences that Lorelei was neither a judgment debtor nor a party. Black's Law Dictionary defines "Appellant," to wit: "The party who takes an appeal from one

court or jurisdiction to another." See Black's Law Dictionary, 89 (Fifth Edition 1979).

However, even assuming, arguendo, that Lorelei should have posted a supersedeas bond, its failure to post such a bond did not divest it of title because the sale was void. Under Texas law, a judgment lacking the proper parties to the record is not valid and is void. Hollingsworth v. Bagley, 35 Tex. 345 at 347 (1871). A purchaser under a void judgment gains no title whatsoever. Id. Neither the vacated Judgment of the district court dated June 7, 1982 nor the Amended Judgment of the district court dated June 11, 1982, even mentioned Lorelei. Texas courts have held that a landowner may not be divested of property pursuant to a decree to which he was not a party. Laird v. Winters, 27 Tex. 440 (1864). Accordingly, the fact that Lorelei did not post a supersedeas bond

becomes irrelevant. The sale being void, no title passed thereby. Under Texas law, the authority of the official to pass title at a judicial sale rests upon the order of sale. Texas courts have held that "without proof of his power to sell, a sheriff's or constable's deed must be treated as a nullity." Atkinson v. Daily, 283 S.W.2d 584 (Tex. Civ. App. - Amarillo 1951) (no writ). In the instant case Guadalupe could only take title to that interest which the marshal was conveying. Since the first lien had been foreclosed upon, the judgment debtor (Vahlco Corporation) had no interest in the Property and the marshal had no interest to convey. Thus, the marshal did not have any title to convey to Guadlaupe at the time of the Marshal's sale. In an analogous case under Texas law, involving an execution sale, the court held that "because the substitute trustee had

previously foreclosed on and conveyed title to the subject property pursuant to the terms of the recorded deed of trust, the Sheriff did not have any title to convey to appellant at the time of the sheriff's sale." Smith v. Morris & Co., 694 S.W.2d 37, 39 (Tex. App. - 13 Dist. 1985).

While Guadalupe County's statement that "it is important that district court have the discretion where the circumstances are appropriate to require the giving of supersedeas bonds as a prerequisite to staying the order pending appeal" might be true as an abstract proposition, such proposition does not apply to this case.

The United States Court of Appeals for the Fifth Circuit made its decisions on the basis of facts and well-settled principles of law, to wit:

> We reverse the October 9, 1984 order of the district court directing the sale of ten acres owned by Lorelei,

because of the following:

...

When (the) senior lien was foreclosed by private sale through the trustee on June 1, 1982, the junior lien of the United States was extinguished. Diversified Mortgage Investors v. Lloyd D. Blaylock, etc., 576 S.W.2d 794, 808 (Tex. 1978); Irving Lumber Co. v. Alltex Mortgage Co., 468 S.W.2d 341, 344 (Tex. 1971); Jeffrey v. Bond, 509 S.W.2d 563, 565 (Tex. 1974).

(Petition at p. 13a)

and further:

The record on appeal indicates that the record title to this ten acres was obtained by Lorelei Corporation on June 4, 1982.

(Petition at p. 13a)

and further:

Neither Lorelei nor Margarita was named as a defendant in the SBA's suit. Neither Lorelei nor Margarita participated in the trial before the judgment was rendered. The record discloses no service of process on Margarita or Lorelei at any time while the case was in the district court. Furthermore, the district court's docket sheets indicate unequivocally that ... Lorelei was not a party to the SBA suit in February 1985 when Lorelei was ordered to post the supersedeas bond.

> Lorelei had neither intervened nor been made a party in the district court.

(Petition at p. 5a)

and further:

> the record contained no proof that Lorelei was the alter ego of the original mortgagor ... the district court had no authority to order the sale of Lorelei's property in the suit brought by the SBA.

(Petition at p. 5a)

The Fifth Circuit further addressed "other appeals involving orders of district courts which affect the rights of parties other than those to the original proceedings" (Petition p. 19) in its holding that:

> as a non-party affected by the judgment, Lorelei was entitled to appeal in order to protect its interests. See United States v. Chagra, 701 F.2d 354, 359 (5th Cir.1983) (citing with approval e.g. SEC v. Lincoln Thrift Ass'n., 577 F.2d 600, 602-03 (9th Cir.1978) and West v. Radio-Keith-Orpheum Corp., 70 F.2d 621, 623-24 (2nd Cir.1934), allowing appeals by non-party creditors who assert rights in receivership proceedings; as well as Brown v. Board of Bar Examiners, 623

F.2d 605, 608 (9th Cir.1980) and Commercial Sec. Bank v. Walker Bank & Trust Co., 456 F.2d 1352 (10th Cir.1972), allowing appeals by non-parties who are named in injunctions.

(Petition at p. 6a.)

The foregoing evidences that there has been no "injustice in the instant case." (Petition at p. 19) The United States Court of Appeals for the Fifth Circuit made a well-reasoned finding, based on the facts in the instant case and the law, that: "It would be manifestly unjust for a court to order a property owner not a party to a lawsuit to post a supersedeas bond in the amount of the judgment in the suit to avoid execution upon the property." (Petition at p. 6a)

CONCLUSION

For all of the foregoing reasons, the Court should not grant the writ of certiorari.

Respectfully submitted,

/s/ John O. Rogers
John O. Rogers
Trust Building
Houlton, Maine 04730
(207) 532-6501
Counsel for Respondent

June, 1990

APPENDIX

UNITED STATES MARSHAL'S DEED

This Indenture, Made and entered into this 23rd day of May in the year of our Lord 19 85, between William J. Jones, Jr. United States Marshal for the Western District of Texas by virtue of his office, of the first part, and Guadalupe County, State of Texas of the second part, County of ~~County of~~ and ~~of~~ of the second part:

Witnesseth, That whereas, at a regular Term of the District Court of the United States, held in and for said District, on the 11th day of June, in the year A. D. 19 82, United States of America, Plaintiff, recovered an amended judgment against Vahlco Corporation, Defendant, in a certain suit for the forfeiture and sale of 10 acres in Guadalupe County, State of Texas and all costs of suit; and whereas, on the 11th day of June, A. D. 19 82, an amended judgment ~~a writ of~~ issued from said District Court for the collection of said judgment, which said amended judgment ~~writ~~ was directed to said William J. Jones, Jr. United States Marshal as aforesaid, and that said amended judgment ~~writ~~ was levied by the said United States Marshal by virtue of his office, and according to the statute in such case made and provided, on the 15th day of April, A. D. 19 85, upon a certain tract or parcel of land, hereinafter described, and which said land was advertised for sale by said United States Marshal according to law, and afterwards, to wit: On the 23rd day of April, A. D. 19 85, in pursuance of said advertisement, the said United States Marshal exposed said land to public sale at Seguin, Texas, and Guadalupe County, State of Texas did bid the sum of One Hundred Twenty-five Thousand ($125,000.00) dollars therefor, which being the highest and best bid, the said land and premises was struck off and sold to him, the said Guadalupe County, State of Texas, the said 10 acres, which will more fully appear by reference to a certificate of purchase given to said purchaser Guadalupe County, State of Texas by the said United States Marshal, bearing date the 23rd day of May A. D. 19 85, by virtue of which purchase and certificate the said Guadalupe County, State of Texas and its assigns became entitled to a Deed for the said premises from the said United States Marshal, because the said premises were not redeemed according to law.

And Whereas, the said certificate of purchase was the 3rd day of April, A. D. 19 85, duly assigned by the said United States Marshal's Service, seller to Guadalupe County, State of Texas, purchaser who now hold the same for value received:

Now Therefore, I, William J. Jonas, Jr., United States Marshal of said District, by virtue of my office, and by force of the statute in such case made and provided, for and in consideration of One Hundred Twenty-five Thousand dollars in hand paid to me by the said Guadalupe County, State of Texas have granted, bargained, and sold, and by these presents do grant, bargain, and sell unto the said Guadalupe County, State of Texas all the right, title, interest, and claim which the said Yahico Corporation, Defendant, on the day of sale aforesaid, had in and to the following-described tract or parcel of land, to wit:

(PLEASE SEE ATTACHMENT #1)

To Have and to Hold, the said tract or parcel of land, together with the appurtenances thereunto belonging, unto the said Guadalupe County, State of Texas, and their assigned forever.

In Witness Wherefor, I have hereunto set my hand and seal this 23rd day of May, in the year of our Lord one thousand nine hundred and eighty-five

William J. Jones, Jr. [seal]
United States Marshal for the Western District of Texas

United States of America
Western District of Texas

I, Charles W. Vagner, Clerk of the District Court of the United States for the Western District of Texas do hereby certify, that William J. Jones, Jr., United States Marshal for the said Western District of Texas, who is to me known to be the person named in and who executed the foregoing Deed of Conveyance, this day personally appeared before me and acknowledged that he executed the same as said United States Marshal, for the uses and purposes therein set forth.

In Witness Wherefor, I have hereunto set my hand and affixed the Seal of said District Court, at the City of San Antonio in said District, this 23rd day of May, in the year of our Lord one thousand nine hundred and eighty-five

Charles W. Vagner, Clerk.

Form 1410

MARSHAL'S DEED

U. S. District Court,

Western District of Texas

UNITED STATES OF AMERICA

versus

VANCO CORPORATION, ET AL.,

Filed 21st day of

May A. D. 1963

Ten (10) acres of land situated in the Humphries Branch Survey, A-6, Guadalupe County, Texas. Said 10-acre tract of land is part of a tract called 97 acres and conveyance from Paula B. Baese to J. D. Jamison recorded in Volume 347 at page 365 of the Deed Records of Guadalupe County, Texas, and is described by metes and bounds as follows:

BEGINNING at the intersection of the West line of said 97-acre tract and the North right-of-way line of Interstate Highway No. 10;

THENCE with the East line of a road North 1 degree 17 minutes West 836.7 feet to an iron stake set for the Northwest corner of the tract herein described;

THENCE North 88 degrees 43 minutes East 490.4 feet to an iron stake set for the Northeast corner of the tract herein described;

THENCE South 1 degree 17 minutes East 864.1 feet to an iron stake set in the North right-of-way line of Interstate Highway No. 10;

THENCE with North line of Interstate Highway No. 10 South 81 degrees 00 minutes West 490 feet to a concrete right-of-way marker;

THENCE continuing with said line North 50 degrees 32 minutes West 124.1 feet to the place of beginning, and being the same property heretofore conveyed by J. D. Jamison et ux to Vahlco Corporation by deed dated October 7, 1970, and recorded in Guadalupe County Deed Record Volume 436 on page 193, and

Each and all of the hereinabove or hereinafter mentioned or referred to instruments or plats and their records, where and when recorded, are hereby expressly incorporated herein and made a part hereof for descriptive purposes, together with all furniture and fixtures therein and included all buildings and structures thereon, and all equipment located at the premises.

RECEIPT

No B 4053

UNITED STATES MARSHAL

WESTERN DISTRICT OF TEXAS

COURT:	2. DATE	4. AMOUNT
U.S. District Court, Seguin, Texas	April 23, 1985	
COURT CASE NUMBER OR PURPOSE OF COLLECTION		
76-CA-126 USA vs Vahlco Corp.		

5. TOTAL $

REMITTER (Note: If check is received in mail and is for process, place in USMS 285 folder)

6. RECEIVED BY (U.S. MARSHALS SERVICE OFFICIAL):

SEGUIN, Texas, April 23, 1985

Guadalupe County, Dr.

United States Marshal Service

Purchase of Property	25000	00
le of Vahlco Property on IH 10 north of Seguin.		
ction conducted by U. S. Marshall, Thomas D. Meeks at 10 A.M - April 23, 1985		
north steps of courthouse. George Crain, Commissioner Prec # 4 was the		
thorized bidder for Guadalupe County as per Court Meeting, April 22, 1985.		
tal Bid was $ 125,000.00. 20 % down payment was required.		

Approved for Payment: General Fund

rrant No. _____

Form USM-203
(Rev. 7/24/78)

UNITED STATES MARSHALS SERVICE

RECEIPT

No B 64272

PRIOR EDITIONS MAY BE USED

UNITED STATES MARSHAL

Western DISTRICT OF Texas

1. RECEIVED OF:	2. DATE
Guadalupe County, State of Texas	May 23, 1985

3. COURT/CASE NUMBER OR PURPOSE OF COLLECTION	AMOUNT
SA-76-CA-106 Ten (10 Acres - Guadalupe County)	$ 100,000.00
Check No. 6803 Nolte National Bank, P. O. Dr. 311	
Dated 5/21/85 Seguin, Texas 78155	
* See Receipt No. B 64253 $25,000.00 Deposited Prior	
Deposited 4/25/85 CD 144	
	5. TOTAL $100,000.00

COPY 1- REMITTER (Note: If check is received in mail and is for process, place in USM-285 folder)

6. RECEIVED BY U.S. MARSHAL'S SERVICE OFFICIAL: Anna Maria Garcia

RECORDED IN OFFICIAL RECORDS
FILE DATE: 5-23-85
FILE TIME: 1:32 O'CLOCK P M
VOL. 734 PAGE 421-13
RECORDING DATE
MAY 24 1985
Cecil E. Schaefer
COUNTY CLERK, GUADALUPE COUNTY

CERTIFICATE OF SERVICE

I hereby certify that three (3) true copies and correct copies of the BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT were forwarded via first class, United States mail, postage prepaid, on the 14TH day of June, 1990, to the following:

John R. Locke, Jr.
GROCE, LOCKE & HEBDON
2000 Frost Bank Tower
San Antonio, Texas 78205

/s/ John O. Rogers
John O. Rogers